SUPREME COURT U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner

v.

IRWIN S. CANTOR, et al, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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October 29, 1975

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PETITION FOR REHEARING

Petitioner respectfully moves the Court to vacate its order denying writ of certiorari, entered on October 6, 1975, and to grant the writ. As grounds, petitioner states:

I.

CONFLICTS IN THE APPLICATION OF THE IMMUNITY DOCTRINE

The posture of the case presented here is nearly identical to that presented in Falkner v. Blanton, No. 73-1609, cert den.

October 29, 1974, 42 L.Ed.2d 190, dissenting opinion by Mr. Justice Douglas, with two remarkable exceptions:

1. In the instant case the district court's summary dismissal was with prejudice; and

2. In the instant case the state judges were sued in their personal capacity for proceeding without subject matter jurisdiction, as denying due process.

As Mr. Justice Douglas pointed out in his dissent in Falkner v. Blanton, some courts have distinguished Pierson v. Ray, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967), where the relief sought is injunctive. Of course, some district courts dismiss summarily under Pierson if the defendant is a judge. Pierson upholds such dismissal if the judge is being sued for "acts committed within [his] judicial jurisdiction." Pierson, supra, at U.S. 553, 554, L.Ed.2d at 294.

It is respectfully submitted that the Court in deciding Pierson did not intend to overrule those principles stated in Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676 (1880), that the act of the judge cannot be merely assumed to be a judicial act.

In Ex parte Virginia the Supreme Court ruled that holding a state office (in that case the office of judge) did not relieve a person of his obligation to obey the Constitution, and further stated at U.S. 348, L.Ed. 680:

> "It was assumed that Judge Cole, in selecting the jury. . .was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character and not by the character of the agent."
>
> (emphasis added)

Under these principles the allegation that the judge has acted without subject matter jurisdiction must necessarily preclude summary dismissal.

The question here cannot be classed as dissimilar to that posed under the umbrella of official immunity in Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974). The Court there clearly recognized that the district court had erred by assuming that officials had acted within the scope of their duties, and remanded for further proceedings, finding the plaintiffs to be entitled to be heard more fully than was possible on a motion to dismiss.

Lower court decisions and Circuit Court opinions are utterly inconsistent in the application of the Pierson v. Ray pronouncement. In Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974), the plaintiff brought a civil rights action for damages against a justice of the peace, the Arizona district court rendered judgment in favor of plaintiff, and the defendant appealed. The Ninth Circuit held that plaintiff's claim was cognizable under the Civil Rights Act, that judicial immunity does not automatically attach, and that the 9th Circuit must inquire as to whether

the judge acted in the clear absence of all jurisdiction, and at 500 F.2d 63 said:

> "* * *We must also look beyond the status of the party seeking immunity and consider the nature of the conduct for which immunity is sought."

II.

QUESTIONS PRESENTED BY RECENT DECISIONS

Recent decisions of this Court appear to leave unsettled at least three questions concerning conflicts in the application of the doctrine of official immunity or between the doctrine and the actual provisions of the United States Constitution and laws.

INTRODUCTION TO QUESTION 1

In O'Shea v. Littleton, 414 U.S. 488, 503, 38 L.Ed.2d 674, 688, 94 S.Ct. 669 (1974), the Court said:

> "* * *we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. Cf. Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676 (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress. . . ." Gravel v. United States, 408 U.S. 606, 627, 33 L.Ed.2d 583, 92 S.Ct. 2614 (1972)."

QUESTION 1.

In view of the admitted lack of power under the judicially fashioned doctrine of official immunity to alter or suspend the effect of the criminal laws made by the Congress, upon what constitutional or statutory ground does the judiciary rely for its asserted power to alter or suspend the effect of the civil laws of Congress, such as 42 U.S.C. Section 1983, as in Pierson v. Ray, supra?

As recently as May, 1975 the Court refused "to invade the legislature's province" by altering or suspending the effect of civil laws of Congress governing the award of attorney fees in federal court actions. Alyeska Pipeline Service Co. v. Wilderness Society, 44 L.Ed.2d 141, 161, 95 S.Ct. 1612, 1628 (May 12, 1975).

INTRODUCTION TO QUESTION 2

As pointed out in Lee v. Florida, 392 U.S. 378, 386, 20 L.Ed.2d 1166, 1172, 1173, 88 S.Ct. 2096 (1968), under Article VI of the United States Constitution, the Constitution and laws made in pursuance thereof together constitute the supreme law of the land. The Court said:

> "* * *Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State [are] bound . . . ."

Article IV of the Constitution gives Congress the power to prescribe by general laws, such as 42 U.S.C. Sections 1981-1988,

the effect of state laws and judicial proceedings.

In Scheuer v. Rhodes, 416 U.S. 232, 237, 40 L.Ed.2d 90, 97, 94 S.Ct. 1683 (1974), the Court affirmed the doctrine of Ex parte Young, 209 U.S. 123, 159, 160, 52 L.Ed. 714, 729, 28 S.Ct. 441 (1908), which held that when a state officer, such as a judge, violates the Federal Constitution in acting as a state official he is in that case stripped of his official character and subjected in his person to the consequences of his individual conduct, and the State has no power to impart to such person any immunity against the supreme law and authority of the United States.

QUESTION 2.

Since the affirmance of the Ex parte Young doctrine, upon what constitutional or statutory ground does the judiciary now rely for the power earlier asserted in Pierson v. Ray, supra, to (1) grant official immunity to a person stripped of his official character, and (2) to grant immunity against the United States Constitution by granting immunity against enforcement of laws specifically made for the purpose of enforcing constitutional provisions, such as 42 U.S.C. Sections 1981-1988?

In Ex parte Virginia, supra, at 100 U.S. 348, 25 L.Ed. 680, the Court said:

> "We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of

Congress to punish his disobedience.

"* * *Whether he was a county judge or not is of no importance.* * *"

INTRODUCTION TO QUESTION 3

In Lee v. Florida, supra, the judicial department recognized that under Article VI the supreme law and authority of the United States is the Constitution and laws made in pursuance thereof.

Under the last clause of Article I, Section 8, Congress has the power to make all laws necessary and proper to carry into execution all powers vested by the Constitution in the judicial department or officer thereof.

QUESTION 3.

In view of Article I, Section 1 and the last clause of Section 8, and Article VI, upon what constitutional or statutory provision does the judiciary now base its earlier asserted power to carry into execution and so into effect a judgment which would alter or suspend the effect of any provision of 42 U.S.C. Section 1981-1988, such as Pierson v. Ray, supra?

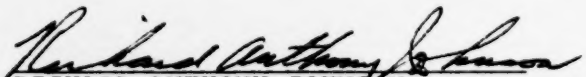
CONCLUSION

Petitioner respectfully submits that answers to the above questions are necessary for a full and proper understanding by the people of the practical availability of the civil rights secured to them on paper by the United States Constitution and laws.

For the above reasons, Petitioner prays the Court to vacate its order denying the writ of certiorari and to grant the writ.

Respectfully submitted this

29th day of October, 1975.



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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay and is restricted to the grounds specified in Rule 58(2).

RICHARD ANTHONY JOHNSON

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 1975, three copies of the Petition for Rehearing on Petition for Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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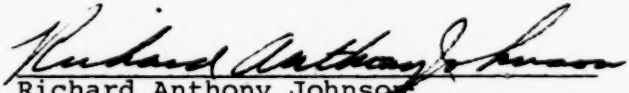

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